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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In re	)	
	)	
Amendment of Section 73.202(b)	)	MM Docket No. 98-107
Table of Allotments,	)	RM-9288
FM Broadcast Stations	)	
(Gaylord, Michigan)	)	

To: Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau

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AUG 12 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**COMMENTS OF DARBY ADVERTISING, INC.**

Darby Advertising, Inc. ("Darby"), by its attorneys, hereby submits its comments in the above-referenced proceeding that proposes to amend Section 73.202(b) of the Commission's rules, the Table of Allotments for FM Broadcast Stations, to substitute Channel 268A for Channel 237A at Gaylord, Michigan, and modify the license for Station WMJZ to specify operation on Channel 268A.

Darby initiated the instant rule making proceeding and proposed the amendment of the FM Table of Allotments to eliminate short spacing between Station WMJZ and an allotment at Sault Ste. Marie, Ontario, Canada on Channel 238C. In support of that proposal, Darby attached as an exhibit to its original Petition for Rule Making (a copy is also attached hereto as Exhibit I) an Engineering Report which shows that the present WMJZ-FM facility is short spaced by 27.38 kilometers to a Canadian Channel 238C allotment at Sault Ste. Marie, Ontario. However, substitution of Channel 237A with Channel 268A will remedy this short spacing problem. The Commission has concurred with this finding and thus issued a *Notice of Proposed Rule Making*, released July 10, 1998, in the above-captioned proceeding (DA 98-1287) ("*NPRM*"). In the *NPRM*, the Commission seeks

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comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's rules, to substitute Channel 268A for Channel 237A at Gaylord, Michigan, and modify Darby's license for Station WMJZ to specify operation on Channel 268A in order to accommodate Darby's request.

Darby incorporates by reference the arguments made in its original Petition for Rule Making to support the amendment of the FM Table of Allotments proposed in the instant proceeding. Pursuant to the *NPRM*, Darby reaffirms its intention to modify the operation of Station WMJZ to Channel 268A when so authorized by the Commission.

WHEREFORE, the above premises being considered, Darby supports an amendment of the FM Table of Allotments, 47 C.F.R. § 73.202(b), as follows:

<u>Community</u>	<u>Present</u>	<u>Proposed</u>
Gaylord, Michigan	237A, 294C1	268A, 294C1

Respectfully submitted,  
DARBY ADVERTISING, INC.

By: Tara S. Becht  
Alan C. Campbell  
Tara S. Becht


Its Attorneys

Irwin, Campbell & Tannenwald, P.C.  
1730 Rhode Island Avenue, N.W.  
Suite 200  
Washington, D.C. 20036-3101  
(202) 728-0400 (phone)  
(202) 728-0354 (fax)

August 12, 1998

**DECLARATION OF KENT D. SMITH**

I, Kent D. Smith, President of Darby Advertising, Inc. ("Darby"), under pain and penalty of perjury, do hereby declare that I have read the foregoing "Comments of Darby Advertising Inc.," filed on this date by Darby, and the facts presented therein are true and correct to the best of my knowledge, information and belief.

  
Kent D. Smith  
President

Date: 8/12/98

## **EXHIBIT I**

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Amendment of Section 73.202(b),  
Table of Allotments,  
FM Broadcast Stations.  
(Gaylord, Michigan)

)  
)  
)  
) MM Docket No. 98-107  
) RM-9288  
)  
)

**Released: July 10, 1998**

**Reply Date: September 15, 1998**

1. Before the Commission for consideration is a petition for rule making filed by Darby Advertising, Inc. ("Darby"), proposing the substitution of Channel 268A for Channel 237A at Gaylord, Michigan, and modification of the license for Station WMJZ to specify operation on Channel 268A. Darby indicated that it would file an application for Channel 268A at Gaylord if the requested channel substitution is granted.

2. Darby states that the substitution of Channel 268A for Channel 237A at Gaylord will eliminate a short spacing between Station WMJZ and an allotment at Sault Ste. Marie, Ontario Canada, on Channel 238C. According to Darby, its current facility is short spaced by 27.38 kilometers to Channel 238C at Sault Ste. Marie, Ontario, which could be eliminated by the substitution of channels at Gaylord. Darby points out that the short spacing arose from the adoption of increased separation distances for Class A stations in the *Amendment of part 15 of the Rules to provide for an additional FM stations class (Class C3) and to increase the maximum transmitter power for Class A FM stations, Second Report and Order*, MM Docket No. 88-375, 4 FCC Rcd 6375 (1989). In order to operate Station WMJZ as a six kilowatt facility, Darby seeks to eliminate the short spacing that currently exists with the allotment at Sault Ste. Marie by substituting Channel 268A for Channel 237A at Gaylord.

3. We believe the public interest would be served by proposing the substitution of Channel 268A for Channel 237A at Gaylord, Michigan, since it would permit operation of Station WMJZ as a six kilowatt facility. A Commission analysis indicates that Channel 268A can be allotted to Gaylord in compliance with the Commission's minimum distance separation

requirements at Darby's specified site.<sup>1</sup> Since Gaylord is located within 320 kilometers of the U.S.-Canadian border, concurrence of the Canadian government will be obtained for this allotment.

4. As requested, we also propose to modify Darby's license for Station WMJZ to specify operation on Channel 268A. In addition, we will not accept competing expressions of interest for the use of Channel 268A at Gaylord because the Commission's Rules do not contemplate the filing of expressions of interest in proceedings, such as this one, which seek to make equivalent channel substitutions.<sup>2</sup>

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

Community	Channel No.	
	Present	Proposed
Gaylord, Michigan	237A, 294C1	268A, 294C1

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **August 31, 1998**, and reply comments on or before **September 15, 1998**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D. C., 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Allen C. Campbell  
Irwin, Campbell, & Tannenwald, P.C.  
1730 Rhode Island Avenue, N.W., Suite 200  
Washington, D. C. 20036

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of

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<sup>1</sup> The coordinates for Channel 268A at Gaylord are 45-01-33 and 84-39-40. This site is 1.1 kilometers (0.7 miles) east of the community.

<sup>2</sup> The Commission considers channels of the same class to be equivalent unless showings have been made that a station cannot be constructed for reasons such as environmental consequences or air hazards. See *Vero Beach, Florida*, 3 FCC Rcd 1049 (1988), rev. denied, 4 FCC Rcd 2184, 2185 (1989).

Allotments, Section 73.202(b) of the Commission's Rules. See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos  
Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204.(b) and 0.283 of the Commission's Rules, **IT IS PROPOSED TO AMEND** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules).

(b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties, must be made in written comments reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal communications Commission,



Washington, D, C. 20554.

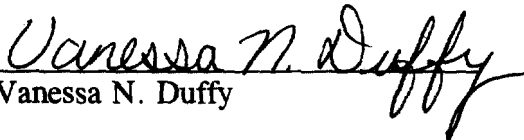
5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D. C.

# CERTIFICATE OF SERVICE

I, Vanessa N. Duffy, hereby certify that on this 12th day of August, 1998, a copy of the foregoing "Comments of Darby Advertising, Inc." has been served by messenger service upon the following:

John A. Karousos  
Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau  
Federal Communications Commission  
2000 M Street, N.W., Room 554  
Washington, D.C. 20554

  
Vanessa N. Duffy